

## Part III

# Regulatory Possibilities



## *Core Labour Standards in the GSP Regime of the European Union: Overshadowed by other Considerations*

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SHOULD CORE LABOUR standards (CLS) as human rights be integrated into trade relations? In the course of the 1990s, in parallel with the rise of globalisation and the establishment of the World Trade Organisation (WTO), the debate on a social clause resurfaced at the top of the international trade agenda. Yet this issue quickly reached a total dead-lock within the multilateral trade regime because of suspicions of hidden protectionism and the concomitant resistance by developing countries.

This chapter takes a particular angle to this topic, focussing on the integration of CLS in the Generalised System of Preferences (GSP) of the European Union (EU). It is assumed that the GSP system, which allows developed countries to unilaterally condition market access on the observance of CLS, may help to increase the legitimacy of a social clause. On the basis of a process-tracing analysis and a study of literature, and with reference to the broader EU trade policy agenda, we attempt to answer the question whether Europe's social GSP has been applied in a way that suspicions of hidden protectionism and the resulting impasse at the WTO level can be removed.

The conclusion reads that the EU's social GSP system has not served protectionist goals, but neither has it substantially enhanced the legitimacy of a social clause. This critical evaluation partly stems from the ambiguity in EU decision-making on CLS conditionality and more fundamentally from its limited generosity in supporting CLS through market access, compared with other foreign policy and trade-related objectives. After all, the EU's limited role in the external promotion of CLS seems to reflect its incomplete internal capacity to act in the very same CLS vis-à-vis the Member States.

## LINKING LABOUR STANDARDS AND TRADE

**The Debate on a Social Clause**

Whereas the promotion of CLS as human rights is widely considered as a legitimate goal in international relations, the potential contribution of trade politics has been the subject of much debate among academics and policy-makers. Neo-liberal economists are highly critical towards the idea of linking labour standards and trade rules.<sup>1</sup> Policy-makers cannot be trusted with such a discretionary power in trade policy. Developed countries will use social clauses as veiled protectionist instruments, undoing the comparative advantage of developing countries in international trade.

According to mainstream neoliberal thinking, other instruments should be employed to achieve this objective. Some point to the role of development aid budgets, but usually the emphasis lays on soft governance mechanisms such as corporate social responsibility, private codes of conduct for multinationals, and social labelling. The indirect influence of the International Labour Organisation (ILO) is equally highlighted.

Proponents of a social clause do not question the ILO's contribution, or the relevance of development aid. Nevertheless they argue that 'fair' trade rules should somehow allow for interventionist trade measures favouring CLS, while at the same time providing enough guarantees against protectionist abuse. Advocates of a social clause refer to moral arguments and to the legitimacy of the trading regime. The free trade system may be efficient, but it also needs to be seen as legitimate by the public at large. One implication of this reasoning may be that the incorporation of labour standards in the world trade regime is necessary to preserve the legitimacy of the liberal international trading system,

Although this 'free versus fair trade' debate has been going on for decades, it became a hot international trade issue only in 1993–94. During the final stage of the General Agreement on Tariffs and Trade (GATT) Uruguay Round, a growing body of opinion expressed itself in favour of a social clause. The United States and France were particularly enthusiastic about including labour standard provisions in the world trade system. They argued for a working group on the social dimension of trade liberalisation under the umbrella of the new-established WTO. This was fiercely resisted by developing countries, especially Malaysia, India, and Pakistan, but countries such as the United Kingdom and Germany were equally reluctant. A last-minute compromise provided that the issue could be put on the WTO agenda at a later stage.

<sup>1</sup> Cf Lee, E, 'Globalisation and Labour Standards: A Review of Issues' (1997) 2 *International Labour Review* 136.

During the coming years the debate on a social clause continued to be highly politicised, culminating in the WTO Singapore Conference in 1996. The Singapore Declaration *de facto* puts the issue on the sidelines, referring to the ILO as the competent organisation to deal with international labour standards, thereby consolidating the idea that social issues are not to be dealt with in the multilateral trade regime.<sup>2</sup> EU and US attempts to put this on the agenda of the WTO Millennium Round failed with the debacle of Seattle, partly because of the growing assertiveness of the developing countries, which strongly rejected US President Clinton's suggestion to introduce a punitive social clause. When a new trade round was finally launched in Doha (2001), the agenda simply referred to the Singapore text. Henceforth, labour standards are excluded from multilateral trade negotiations. The impasse at the WTO track provided the ILO with the opportunity to present itself as the appropriate international forum on labour standards.

This brief sketch illustrates the resistance against the idea of a social clause, for fear of veiled protectionism; and the deadlock in the WTO, due to developing country opposition. The next section explains why the GSP of the EU may address both related problems.

### **Focussing on the GSP of the European Union**

In the 1970s the GATT established the GSP system as a temporary exception to the Most Favoured Nations (MFN) principle in the context of developing countries' demands for a New International Economic Order. Under the 1979 Enabling Clause, industrial countries are allowed to grant more favourable and non-reciprocal tariff preferences to developing country imports. Each developed country can unilaterally design its own GSP scheme, determining the product coverage and the extent of liberalisation. Differentiation among developing countries is also possible; for example, the EU's 'Everything But Arms' (EBA) initiative of 2001 constitutes a special GSP, granting more favourable tariff preferences to the group of least-developed countries (LDCs).<sup>3</sup>

Equally, developed countries may differentiate based on developing countries' compliance with CLS. There are two dimensions to such a 'labour GSP clause': on the one hand, additional tariff reductions can be granted to countries observing CLS, on the other, GSP preferences may be withdrawn in the case of serious violations of these standards. The 'carrot' implies that

<sup>2</sup> Wilkinson, R, 'The WTO in Crisis: Exploring the Dimensions of Institutional Inertia' (2001) 3 *Journal of World Trade* 35, 409.

<sup>3</sup> Council Regulation (EC) No 416/2001 of 28 February 2001 amending Regulation (EC) No 2820/98 applying a multiannual scheme of generalised tariff preferences for the period 1 July 1999 to 31 December 2001 so as to extend duty-free access without any quantitative restrictions to products originating in the least developed countries, OJ L 60, 1.3.2001, p.43–50.

developing countries can export to western markets at tariffs that are more generous than the standard GSP rate, whereas the 'stick' reverts the level of market access back to the regular MFN level.

Until recently the WTO compatibility of such labour GSP conditionality remained unclear. Under what conditions is discrimination among developing countries allowed under the GATT Enabling Clause? Following Europe's inclusion of Pakistan in the GSP drug arrangement in 2001 (see below), India decided to bring this question to the WTO dispute settlement mechanism. Although India chose to limit its formal complaint to the drugs incentives after consultations with the EU,<sup>4</sup> it was feared that a conviction of the drug regime would also undermine the legitimacy of the labour arrangements.<sup>5</sup> But in contrast with the more restrictive Panel Report,<sup>6</sup> in 2004 the WTO Appellate Body basically ruled that discrimination is allowed under the Enabling Clause provided that the selection is based on objective and transparent criteria.<sup>7</sup> Although the drug arrangement was found illegal, objective and transparent labour incentive provisions in Europe's GSP regimes continue to be legitimate.<sup>8</sup>

This is an important finding, since labour GSP clauses may help to solve the double problem identified above as the major obstacle at the multilateral level: avoiding protectionist misuse of and overcoming developing country opposition against a social clause. Although a much more ambitious trade and aid package would be needed to integrate labour standards in trade relations without raising legitimate fears of hidden protectionism with developing countries, we argue that the integration of labour standards in the GSP trade system potentially constitutes a first symbolical step.

First, the GSP system is by nature incentive-based rather than punitive. In itself the GSP already provides more favourable market access, and the special labour incentives are even more beneficial. Moreover, the sanction clause is limited compared with article XX of the WTO: developing countries that

<sup>4</sup> Thailand's earlier request for consultations never led to the establishment of a World Trade Organisation (WTO) panel.

<sup>5</sup> Cole, A, 'Labor Standards and the Generalised System of Preferences: the European Labor Incentives' (2003) *Michigan Journal of International Law* 25; Howse, R, 'India's WTO Challenge to Drug Enforcement Conditions in the European Community GSP: a Little Known Case with Major Repercussions for "Political" Conditionality in US Trade Policy' (2003) 2 *Chicago Journal of International Law* 4.

<sup>6</sup> European Communities—Conditions for the Granting of Tariff Preferences to Developing Countries—Report of the Panel, WT/DS246/R, 1.3.2003.

<sup>7</sup> European Communities—Conditions for the Granting of Tariff Preferences to Developing Countries—Report of the Panel, WT/DS246/AB/R, 7.4.2004.

<sup>8</sup> However, Bartels doubts whether the sanction clause is still permitted under WTO rules: Bartels, L, 'The WTO Ruling on EC—Tariff Preferences to Developing Countries and its Implications for Conditionality in GSP Programs' in T Cottier, J Pauwelyn and E Bürgi (eds), *Human Rights and International Trade* (Oxford, Oxford University Press, 2005); cf Charnovitz, S, Bartels, L, Howse, R and Bradley, J, 'The Appellate Body's GSP Decision' (2004) 2 *World Trade Review* 3.

violate CLS risk sliding back into the regular MFN rate instead of the normal GSP, but their imports are not banned. They are still allowed to export albeit at a higher tariff. Ultimately, the legitimacy of the sanctioning and the stimulating clauses depends on the objectivity and transparency of the decision-making process, on the consistency of GSP applications with the ILO findings, and on the generosity of labour incentive schemes. If these three conditions are fulfilled, a social GSP clause can barely be considered as a protectionist tool.

Secondly, this would also enhance the legitimacy of incorporating labour standards in the WTO regime. A successful application of the unilateral labour GSP clause may help to overcome the current deadlock in the multilateral trade negotiations. Experiences with the GSP labour system could provide a concrete basis for discussions on a social clause and pave the way for similar schemes in the WTO. From this perspective the GSP labour clause is largely symbolic: it enhances the legitimacy of the idea of a social clause, even though the potential economic benefits are limited given the ongoing phenomenon of tariff erosion.

Indeed, the difference between the internationally-agreed MFN and zero tariffs—which is precisely the maximum scope for GSP concessions—has strongly decreased in the past decades, and with it the leeway for labour conditionality. Nevertheless, the available preferential margin is still relatively large. Precisely those sectors where developing countries have a competitive advantage, viz. agriculture and textiles, continue to be characterised by high tariff peaks. Thus, there is still much room for tariff reductions under the GSP, especially for sensitive products.<sup>9</sup>

Yet to what extent and how has this preferential margin been used? This chapter addresses this question, focusing on the GSP of the EU. Through the unilateral use of its GSP system—in fact a trade regulation based on article 133 of the EC Treaty—the EU has a considerable discretion to attach (positive or negative) conditionality with regard to CLS. The conditioning of access to the prosperous European market is one of the Union's most powerful trade and even foreign policy instruments.<sup>10</sup>

Delineating our research to the EU's policy on a social clause in the GSP, and not in bilateral or multilateral trade issues, has the advantage that there are no third countries involved. The absence of a third (international)

<sup>9</sup> The Generalised System of Preferences (GSP) tariff margin may even increase, since WTO concessions often involve the 'tariffication' of previous non-tariff barriers. This is certainly also the case for the EU. India's challenge before the WTO illustrates that the labour GSP preferences make a difference for Indian textile exporters to the EU compared with their Pakistani competitors. Also, the EU's scapegoat role in the WTO negotiations on agricultural market access show that—despite Everything But Arms' (EBA) treatment for the least-developed countries (LDCs)—there is still room for tariff reductions vis-a-vis other developing countries.

<sup>10</sup> Smith, M and Woolcock, S, 'European Commercial Policy: A Leadership Role in the New Millennium?' (1999) 4 *European Foreign Affairs Review* 451.

negotiating level in EU trade policy-making analysis solves one of the main obstacles to determining Europe's commitment to a social clause. Previous research has suggested that labour standards have not been an EU priority in the past decade.<sup>11</sup> Member States have long been divided on the issue of a social clause, implying that at the crucial Singapore Conference the Council Presidency could not even bring up an 'EU' position. Moreover, Europe's commitment to other trade-related issues such as competition and investment prevailed, whereas the issue of labour standards was abandoned even months before Doha. However, it remains difficult to assess the 'EU factor' in the multilateral setting of the WTO, since the impasse is usually explained by the mere reference to developing country resistance—without further questioning the actual EU commitment on labour standards in WTO negotiations. Being entirely designed by EU policy-makers, the GSP provides a better way to distil the 'EU factor', analysing whether Europe's discourse about CLS in trade corresponds with its actual policy practise.

The following sections describe the development and application of labour standards in the EU GSP through the 1990s. On the basis of a process-tracing analysis and a study of literature, and with reference to the broader EU trade policy agenda, we attempt to answer the question whether Europe's social GSP has been applied in a way that suspicions of hidden protectionism and the resulting impasse at the WTO level can be removed.

#### A SOCIAL CLAUSE IN EUROPE'S GSP: DEVELOPMENT AND APPLICATION

##### The First Social GSP Clause: the Stick before the Carrot

Proposals for a social clause in EC trade relations had already been tabled at the end of the 1970s,<sup>12</sup> but these quickly sank into oblivion.<sup>13</sup> Even the

<sup>11</sup> For similarly critical views on Europe's commitment within the WTO, see Novitz, T, 'Promoting Core Labour Standards and Improving Global Social Governance: an Assessment of EU Competence to Implement Commission Proposals' (2002) *EUI Working Papers* 59, 7–8; and Van den Hoven, A, 'Assuming Leadership in Multilateral Economic Institutions: The EU's 'Development Round' Discourse and Strategy' (2004) 2 *West European Politics* 265–67. Other analyses, in contrast, consider the EU as 'the most aggressive proponent': Young, AR, 'The EU and World Trade: Doha and Beyond' in M Green Cowles and D Dinan (eds), *Developments in the European Union 2* (Basingstoke, Palgrave Macmillan, 2004); or as a 'leader': Johnson, A, *European Welfare States and Supranational Governance of Social Policy* (Houndmills, Palgrave, 2005) 178 in promoting a social clause within the WTO; Orbie, J, Vos, H and Taverniers, L, 'EU Trade Policy and a Social Clause: a Question of Competences?' (2005) *Politique Européenne* 17.

<sup>12</sup> Alston, P, 'Linking trade and human rights' in J Delbrück, W Fiedler and W Ewening (eds), *German Yearbook of International Law* (Berlin, Duncker & Humblot, 1980) 141; Hansson, G, 'Social Clauses and International Trade. An Economic Analysis of Labour Standards in Trade Policy' (1981) *Lund Economic Studies* 25.

<sup>13</sup> Arts, K, *Integrating Human Rights into Development Cooperation. The Case of the Lomé Convention* (Den Haag, Kluwer Law International) 125.



Commission's comprehensive proposal for a 10-year GSP reform in 1990<sup>14</sup> contained no reference whatsoever to labour standards. In the context of the debate during the last months of the Uruguay Round, proposals for a social clause quite suddenly reappeared on the EU agenda at the instigation of France, Belgium, and the European Parliament. Although initially reluctant, Trade Commissioner Sir Leon Brittan also showed himself in favour of this idea. His suggestion to include labour standards in the reformed GSP<sup>15</sup> system was followed by consultations with the Member States and by an official Commission proposal.<sup>16</sup> A few months later the Council gave its approval to the first European GSP regulation with provisions on labour standards.<sup>17</sup> Although the principle of a social clause was supported by a broad majority within the Council of Ministers,<sup>18</sup> two Member States remained reluctant. The desirability of linking labour standards and trade was questioned by the Conservative governments in Germany and especially in the United Kingdom, which abstained from voting on the final GSP regulation.<sup>19</sup>

Developing countries needed to adopt the substance of the relevant ILO conventions in their legislation and they had to effectively apply (but not ratify) them. The ILO was in no respect involved in the supervision procedure, but the Commission had a central role in the suspension procedure in case of violations of the relevant labour standards. Brandtner and Rosas observe that the Commission has a relatively large margin of appreciation (assessing the 'interest' of the complaining party, deciding whether or not to initiate and terminate an investigation, and proposing the withdrawal of preferences) although the final responsibility lies with the Council of Ministers, acting by qualified majority.<sup>20</sup>

<sup>14</sup> AE Documents 3 August 1990.

<sup>15</sup> Communication from the Commission (EC) to the Council and the European Parliament integration of developing countries in the international trading system, Role of the GSP 1995–2004 COM (1994) 212 final, 1.7.1994.

<sup>16</sup> Proposal for a Council Regulation (EC) applying a three-year scheme of generalized tariff preferences (1995–97) in respect of certain industrial products originating in developing countries, COM (1994) 337, OJ C 333, 29.11.1994, p.9

<sup>17</sup> Council Regulation (EC) No 3281/94 of 19 December 1994 Applying a four-year scheme of generalized tariff preferences (1995 to 1998) in respect of certain industrial products originating in developing countries, OJ L 348, 31.12.1994.

<sup>18</sup> For a general overview of the decision-making process behind this GSP reform, see Waer, P and Driessen, B, 'The new European Union Generalised System of Preferences. A Workable Compromise in the EU—But a Better Deal for Developing Countries?' (1995) 6 *Journal of World Trade* 29; for a more general analysis of the EU debate, see Waer, P, 'Social Clauses in International Trade. The Debate in the European Union' (1996) 4 *Journal of World Trade* 30; and Barnard, C, 'The External Dimension of Community Social Policy: the Ugly Duckling of External Relations' in N Emiliou and D O'Keeffe (eds), *The European Union and World Trade Law After the Gatt Uruguay Round* (United Kingdom, John Wiley & Sons, 1996).

<sup>19</sup> 1820th Council Meeting, Draft minutes, 19–20 December 1994, 11982/94, PV/CONS 92.

<sup>20</sup> Under the 'temporary withdrawal' procedure (art 10–12), Member States or 'any natural or legal persons, or associations not endowed with legal personality which can show an interest in such withdrawal', could bring violations to the Commission's attention. This may lead

Another notable characteristic of the first social GSP clause is the emphasis on the punitive dimension (Title III of the Regulation), whereas the decision on the possible introduction of an incentive regime (Title II) was postponed. The original Commission document of April 1994 did make a distinction between the 'carrot'<sup>21</sup> and the 'stick'.<sup>22</sup> But the final Council Regulation provided that the suspension clause could be applied from 1995 onwards, whereas the possible introduction of the carrot was postponed.

This decision somewhat contradicted Europe's discourse on the multilateral trade front. Despite divergent opinions on the desirability of a social clause, there was a broad EU consensus on the need for positive (non coercive) measures. The reason for this inconsistency of course lies in the different economic effects of the stick versus the carrot. While the first option can only benefit EU producers (and in case trade sanctions did hurt EU producers, special measures were foreseen), the carrot implied larger trade concessions. This explanation fits in with the general observation that the new GSP system was on the whole more restrictive than the previous one.<sup>23</sup>

Intra-European competence conflicts also emerged. EU Member States' susceptibility to cede competences to the EU in these domains also characterised the political debate about a social GSP clause. Several Member States such as Germany, the United Kingdom and the Netherlands, but also proponents of a social clause such as France and Denmark attached a declaration to the Council minutes, stressing that the references to labour standards in ILO Conventions 'do not imply any Community competence in respect of the matter contained'.<sup>24</sup> They apparently fear that external Community competences to promote labour standards could bring a 'boomerang effect' on *intra*-European relations.

The Regulation soon resulted in two complaints by the international trade union movement against alleged abuses of labour rights. In the case of Burma (Myanmar), the Commission and the GSP Committee decided to investigate practices of forced labour. The Commission held hearings with

to consultations in the GSP Committee with Member State representatives and chaired by a Commission representative. Based on this, the Commission could decide to initiate an investigation. During this investigation the Commission may hear the interested parties and it may 'dispatch its own experts to establish on the spot the truth of the allegations'. If it concludes that withdrawal is necessary, it makes a submission to the Council, which decides by qualified majority voting. Brandtner, B and Rosas, A, 'Trade Preferences and Human Rights' in P Alston (ed), *The EU and Human Rights* (New York, Oxford University Press, 1999) 715.

<sup>21</sup> International Labour Organisation (ILO) Conventions No 87 and No 98 on freedom of association and the right to organise; No 138 on minimum age for employment.

<sup>22</sup> In case of forced labour as defined in ILO Conventions No 29 and No 105.

<sup>23</sup> Cf Waer and Driessen 'The New European Union Generalised System of Preferences' (1995) 124.

<sup>24</sup> 1820th Council Meeting, Draft minutes, 19–20 December 1994, Statement by the UK, Denmark, Germany, France and the Netherlands.

several parties, but the Burmese State Law and Order Restoration Council (SLORC) regime refused the entry of a European fact-finding team into the country. In 1997 the Council approved the Commission's conclusion that Burma's tariff preferences had to be withdrawn on the basis of Title III of the GSP Regulation.<sup>25</sup>

Another complaint against child labour in Pakistan, however, never resulted in an investigation. Some suggest that Member States feared 'retaliation and cancellation of contracts' in Pakistan.<sup>26</sup> The Commission advances legal arguments: at that time the social GSP clause allowed for a suspension on the basis of forced labour or prison labour, not child labour as such.<sup>27</sup> Some discern a distinction between child labour as an instance of forced labour and child labour as an economic contribution to the survival of their families. Others notice a new approach to improving CLS, favouring incentive to punitive measures. In contrast to the Burmese case, the Pakistani authorities were willing to cooperate and to deal with the problem of child labour.<sup>28</sup> Apart from substantial considerations, the Pakistan case shows that the transparency of the decision-making procedure leaves much to be desired: 'the whole procedure has been conducted not only away from public accountability, but in deep secrecy'.<sup>29</sup> Instead of being excluded from EU preferences, Pakistan would move up on Europe's 'preferential pyramid' through the GSP drugs incentives.

### The GSP Incentive Scheme: not Just about Labour Rights

In May 1998, the Council finally approved a social incentive scheme<sup>30</sup> based on Commission documents in May, June and October 1997.<sup>31</sup> The

<sup>25</sup> Fierro, E, *The EU's Approach to Human Rights Conditionality in Practice* (The Hague/London/New York, Martinus Nijhoff Publishers, 2003) 371–74.

<sup>26</sup> Tsogas, G, 'Labour Standards in the Generalised Systems of Preferences of the European Union and the United States' (2000) 3 *European Journal of Industrial Relations* 6, 362.

<sup>27</sup> Fierro, *The EU's Approach to Human Rights Conditionality in Practice* (2003) 375–76.

<sup>28</sup> Dispersyn, M, 'La Dimension Sociale Dans le Système des Préférences Généralisées (SPG) de l'Union Européenne' (2001) *Revue du Droit ULB* 23, 109; Brandtner and Rosas, 'Trade Preferences and Human Rights' (1999) 717–18.

<sup>29</sup> Tsogas, 'Labour Standards in the Generalised Systems of Preferences of the European Union and the United States' (2000) 364.

<sup>30</sup> Council Regulation (EC) No 1154/98 of 25 May 1998 applying the special incentive arrangements concerning labour rights and environmental protection provided for in Articles 7 and 8 of Regulations (EC) No 1256/96 applying multiannual schemes of generalised tariff preferences in respect of certain industrial and agricultural products originating in developing countries, OJ L160, 4.6.1998, p.1–10.

<sup>31</sup> AE 6976 17 May 1997; Commission Report to the Council pursuant to Article 7(2) of Council Regulations Nos 3281/94 and 1256/96 on the scheme of generalized preferences—Summary of work conducted within the OECD, ILO and WTO on the link between international trade and social standards COM (1997) 260, 2.6.1997; Commission Report to the Council pursuant to Article 8(2) of Council Regulations Nos 3281/94 and 1256/96 on the

Commission proposal basically reflected the previous one in 1994: additional tariff preferences for countries that incorporate ILO Conventions Nos 87, 98 and 138 in their legislation and take effective measures to implement and control these labour rights. Developing countries requesting to benefit from this arrangement need to supply all necessary information to the Commission, which makes an inquiry into the eligibility of the country involved. The Commission can carry out on-site inspections, assisted by the country's authorities and possibly also by EU Member States. After consulting with the GSP Committee, the Commission decides whether the preferential margin will be granted.<sup>32</sup>

Again there is no ratification requirement: potential beneficiaries have to adopt the contents of the relevant ILO conventions. Dispersyn doubts whether the Commission has the means and expertise to make such evaluations and to carry out fact-finding missions.<sup>33</sup> He also observes that, once the incentive tariff has been granted, the monitoring of labour rights largely depends on Europe's confidence in and cooperation with the beneficiary country's authorities.<sup>34</sup>

Looking at the political debate, the most remarkable evolution is the consensus within the Council about the principle of a social clause. This reflects the growing dominance of centre-left governments within the Council and in particular the electoral victory of New Labour in the United Kingdom. Ironically, traditional sceptics of a social clause (the United Kingdom and the Netherlands) at that time favour a more generous incentive scheme, whereas advocates of this idea (Spain, Portugal, Greece) want smaller tariff reduction for countries complying with CLS.<sup>35</sup> The objective to promote CLS seems to be overshadowed by economic considerations, basically reflecting the familiar trade policy debate in the EU between the 'Northern liberals' and the 'Southern Club Med'.

About half a year later, the different GSP systems were merged into one single GSP regulation. The Northern Member States used this occasion to voice criticism about the incentive arrangement, arguing that 'the preferences should have been more substantial than those now adopted in order

scheme of generalized preferences—Summary of work conducted within the ITTO, OECD and WTO on the link between international trade and the environment, COM (1997) 260, 2.6.1997, Proposal for a Council Regulation (EC) applying the special incentive arrangements concerning labour rights and environmental protection provided for in Articles 7 and 8 of Council Regulations (EC) Nos 3281/94 and 1256/96 applying the scheme of generalized tariff preferences in respect of certain industrial and agricultural products originating in developing countries, COM (1997) 534 final, OJ C 360, 26.11.1997.

<sup>32</sup> Dispersyn, M, 'Régulation et Dimension Sociale Dans le Système des Préférences Généralisées (SPG) de l'Union Européenne' in C Euzéby, F Carluier et al (eds), *Mondialisation et Régulation Sociale. Tome 1* (Paris, L'Harmattan, 2003) 457.

<sup>33</sup> Ibid 103.

<sup>34</sup> Ibid.

<sup>35</sup> AE 7200 14–15 April 1998; AE 7207 24 April 1998.

to create real incentives for the developing countries. We wonder where the basic aim of the system can be achieved under these premises'.<sup>36</sup>

European importers also accused the Southern Member States of being 'primarily concerned with the frightening prospect of increased imports', rather than engaging in a coherent strategy for improving labour standards throughout the world.<sup>37</sup>

Another point of criticism concerns the adoption of 'double standards', viz. the differences in the sets of labour standards chosen for the incentive and the punitive regimes. Tsogas denounces that '[I]t seems that, according to this peculiar EU "carrot and stick" approach, exploiting children and organising death squads against trade unionists are less serious breaches of human rights than running forced labour camps!'.<sup>38</sup> He castigates the dual character of the EU system, because it goes against the universality of the ILO fundamental rights. Given that the 1998 GSP reforms coincided with the ILO Declaration on Fundamental Principles and Rights at Work, the EU could have chosen to use all eight fundamental labour conventions as a basis for both the incentive and the punitive clause. Although some Member States made suggestions for such a consistency with the ILO Declaration,<sup>39</sup> it took another three years before this materialised.

Thus, although the social incentive clause had been envisaged since 1994, one year elapsed between the first Commission document (May 1997) and the final Council Decision (May 1998) on the new GSP. This timing is important because, during the very same period, the EU approved other GSP regulations that have an impact on the effectiveness of the new-established social incentive clause. First, there is the graduation of Hong Kong, Singapore and South Korea from the GSP regime, implying that they no longer qualify for the labour incentive scheme.<sup>40</sup> Secondly, the Union enlarged its market access for products originating from LDCs since 1 January 1998.<sup>41</sup> This forerunner of EBA stems from a Council agreement in June 1997. It grants non-African, Caribbean and Pacific LDCs equivalent market access as their ACP counterparts under the Lomé regime. Although in principle this initiative does not affect the social incentive clause, it

<sup>36</sup> GSP Working Party, Document to Coreper/Council, 14166/1/98 REV 1, 21 December 1998.

<sup>37</sup> Von Schöppenthau, P, 'Social Clause: Effective Tool or Social Fig Leaf?' (1998) *European Retail Digest* 20, 44.

<sup>38</sup> Tsogas (n 26) 363–64.

<sup>39</sup> Ibid.

<sup>40</sup> Council Regulation (EC) No 2623/97 of 19 December 1997 applying Article 6 of Regulations (EC) No 3281/94 and (EC) No 1256/96 on multiannual generalized tariff preferences schemes in respects of certain industrial and agricultural products originating in developing countries, OJ L 354, 30.12.1997, p.9–10.

<sup>41</sup> Council Regulation (EC) No 602/98 of 9 March 1998 extending the coverage of Regulations (EC) No 3281/94 and No 1256/96 concerning community schemes of generalised tariff preferences for the benefit of the least-developed countries OJ L 80, 18.3.1998, p.1–16.

essentially reduces the attractiveness for LDCs to request additional trade preferences based on CLS.

A similar logic, thirdly, applies to the Latin American countries that benefit from the GSP drug arrangement. Since 1990 members of the Andean Community (Bolivia, Colombia, Ecuador, Peru and Venezuela) had benefited from a GSP arrangement that granted additional market access to countries that fight against drug trafficking and production.<sup>42</sup> In 1998 the EU wanted to extend this drug arrangement to members of the Central American Common Market (CACM): Costa Rica, Guatemala, Honduras, Nicaragua, El Salvador and Panama. However, the Commission proposal also suggested that the Andean Community and CACM beneficiaries of the drug arrangements would henceforth have to comply with the labour incentive arrangement as well. In other words, their (continued) benefits from the GSP tariff reduction would also depend on their compliance with the relevant CLS. Otherwise the new social incentive scheme would be almost superfluous for these Latin American countries.

This linkage between drugs and social provisions provoked considerable debate. The Colombian president of the Andean Community started a lobby campaign in the European capitals. At the instigation of Spain, Italy and the United Kingdom,<sup>43</sup> the Council kept the drugs and labour incentive arrangements separate, arguing that a linkage between both regimes would run counter to the incentive-based character of the GSP.<sup>44</sup> Former beneficiaries from the Andean Community would indeed face higher tariffs if they fail to comply with the labour requirements. The European Parliament<sup>45</sup> and the international trade union movement strongly criticised this decision, pointing to the assassination of nearly 1,500 trade union activists in Colombia:

the one time there is a courageous proposal emanating from Europe, one that respects human rights and allows for real pressure on the political leaders of Latin America, it is not supported by our countries. Incomprehensible. [...] The one time the EU had an instrument for putting pressure on the oligarchies in these countries, the political debate was eclipsed. It is crushing.<sup>46</sup>

<sup>42</sup> Council Regulation (EEC) No 3835/90 of 20 December 1990 amending Regulations (EEC) No 3831/90, (EEC) No 3832/90 and (EEC) No 3833/90 in respect of the system of generalized tariff preferences applied to certain products originating in Bolivia, Colombia, Ecuador and Peru OJ L 370, 31.12.1990, p.126–132.

<sup>43</sup> AE 7348 23–24 November 1998.

<sup>44</sup> AE 7357 5 December 1998.

<sup>45</sup> Resolution on the Communication from the Commission to the Council on the trading system and internationally recognised labour standards (COM(96)0402—C4-0488/96), European Parliament, A4-0423/98, OJ C104, 13.1.1999.

<sup>46</sup> AE 7357 5 December 1998.

### The 2001 Reform of the GSP: Limited Applications, Larger Role for the ILO

The point of departure in the subsequent 2001 reform was the unsuccessful application of the social GSP clause. Moldova became the first beneficiary of the labour incentive regime in November 2000.<sup>47</sup> Burma and Moldova were for a long time the only (respectively negative and positive) applications of labour arrangements in Europe's GSP scheme. In its proposal for GSP reform, the Commission admitted that 'the special incentive arrangements did not encounter the success that was hoped for at the time they were adopted'.<sup>48</sup>

This unsuccessfulness clearly relates to the limited number of *potential* beneficiaries. Although legally eligible for the incentive clause, many developing countries already enjoy additional access to the European market through other trade arrangements. ACP countries benefit from the relatively favourable provisions under the Lomé/Cotonou Agreements. The EBA Regulation of February 2001 basically abolished tariff duties for ACP and non-ACP LDCs. There are also the abovementioned Latin American beneficiaries of the drug arrangement.

However, also potential beneficiaries were reluctant to take up the available labour incentive arrangement. Although the Commission shortly mentions that this may be due to 'the relatively small margin of preferences available under those arrangements', it put much more emphasis on the 'extremely complicated calculation of the additional preferences that beneficiaries might get on top of the normal ones—which are already sufficiently difficult to calculate'.<sup>49</sup> The Commission therefore proposed some rather technical simplifications of the social incentive procedures.

Some developing countries, such as India and Pakistan, still resisted any linkage of trade relations with labour standards as a matter of principle.<sup>50</sup> They also criticised the Commission's authority to carry out on-site inspections of the implementation of CLS as an infringement on their national sovereignty.<sup>51</sup> Anyhow, apart from the incentive arrangement's complexity,

<sup>47</sup> Commission Regulation (EC) No 1649/2000 of 25 July 2000 granting the Republic of Moldova the benefit of the special incentive arrangements concerning labour rights, OJ L189, 27.7.2000, p.13.

<sup>48</sup> Proposal for a Council Regulation applying a scheme of generalised tariff preferences for the period 1 January 2002 to 31 December 2004, COM (2001) 293, OJ C 270E, 25.9.2001, p.24–76; Council Regulation (EC) No 2501/2001 of 10 December 2001 applying a scheme of generalised tariff preferences for the period from 1 January 2002 to 31 December 2004—Statements on a Council Regulation applying a scheme of generalised tariff preferences for the period from 1 January 2002 to 31 December 2004, OJ L346, 31.12.2001, p.1–60.

<sup>49</sup> Ibid.

<sup>50</sup> AE 7233 2–3 June 1998.

<sup>51</sup> Dispersyn, 'La Dimension Sociale Dans le Système des Préférences Généralisées (SPG) de l'Union Européenne' (2001) 109–10.



the additional tariff margin for developing countries turns out to be too small to entail the abandonment of their fundamental objections to the idea of a social clause.

The Commission also proposed an extension of the relevant ILO labour standards. Referring to the 1998 Declaration on Fundamental Principles and Rights at Work, the national legislation of beneficiaries of the incentive regime has to incorporate the substance of the standards laid down in *all eight* fundamental ILO Conventions. In the previous GSP regulations, only Convention Nos 87, 98 and 138 were referred to. Similarly, the withdrawal of GSP benefits will be based on ‘serious and systematic violation’ of ILO Convention Nos 87, 98, 29, 105, 138, 182, 100 or 111. The Council’s approval of this extended legal basis was undoubtedly facilitated by the fact that it could not harm EU economic interests.

But it also illustrates the emerging European consensus about the ILO as the competent organisation to deal with CLS—even though formal ratification of the relevant ILO conventions is not required. The key reference is to the relevant conventions rather than the principles in the 1998 Declaration.<sup>52</sup> An even more remarkable indication of the ILO’s increasing relevance is that from now on this organisation’s proceedings will be taken into account during the GSP decision-making process:

The available assessments, comments, decisions, recommendations and conclusions of the various supervisory bodies of the ILO, including in particular Article 33 procedures, should serve as the point of departure for the examination of requests for the special incentive arrangements for the protection of labour rights, as well as for the investigation as to whether temporary withdrawal is justified on the grounds of violations of ILO Conventions.<sup>53</sup>

The new regulation also cautiously hints to a possible future linkage of drugs preferences with labour standards. But the 2004 WTO dispute would necessitate a much more radical reorganisation of Europe’s incentive regimes.

### **The Difference between GSP and GSP+**

The 2001 reforms were not very helpful in stimulating the use of the GSP social clause. In 2004 Sri Lanka became the second beneficiary of the

<sup>52</sup> Alston, P, ‘“Core Labour Standards” and the Transformation of the International Labour Regime’ (2004) 3 *European Journal of International Law* 15, 492.

<sup>53</sup> Council Regulation (EC) No 2501/2001 of 10 December 2001 applying a scheme of generalised tariff preferences for the period from 1 January 2002 to 31 December 2004—Statements on a Council Regulation applying a scheme of generalised tariff preferences for the period from 1 January 2002 to 31 December 2004, OJ L 346, 31.12.2001, p.1–60.



incentive scheme<sup>54</sup> but there was no decision on the requests by the Ukraine, Uzbekistan, Georgia and Mongolia;<sup>55</sup> and the Commission initiated an investigation to alleged violations of the freedom of association in Belarus. In addition, the legality of the labour standards in Europe's GSP was contested by India before the WTO. In November 2001, the EU included Pakistan in the list of beneficiary countries of the drug arrangement. It explicitly situated this measure in the context of the events of 11 September and the international community's acknowledgement of Pakistan's serious problems. The proposal adds that Pakistan's 'campaign to eradicate the production and transit of drugs' should be supported and that Pakistan faces similar problems as the Andean Community and the CACM countries.<sup>56</sup> Within the Council, only Portugal voted against the resolution, arguing that Pakistan did not satisfy the criteria of the drugs arrangement and it may not be compatible with WTO law.<sup>57</sup>

As explained above, the decision was indeed challenged before the WTO. Although the Appellate Body's ruling did not undermine the social GSP clause as such, it suggested that Europe's attempts to promote labour standards through its GSP regulations needed to be made more objective and transparent. Therefore the EU reviewed its incentive schemes, abandoning the separate social, environmental and drugs clauses and incorporating these into a broader 'sustainable and good governance' regime.<sup>58</sup> To be eligible for the incentives under this 'GSP+' system, requesting countries have to 'ratify and effectively implement' several international conventions that are listed in Annex III. More specifically, it concerns all the conventions of Part A (including the eight ILO fundamental conventions, but also, for example, the Convention Against Torture) and at least seven of Part B (for example, the Kyoto Protocol, the United Nations (UN) Convention against Corruption), with a commitment to overall ratification and implementation by the end of 2008.

This time the EU took a somewhat different approach to stimulate requests for the incentive regime. In the new GSP Regulation, 14 developing countries were provisionally listed as GSP+ beneficiaries. They received GSP preferences since July 2005, but in order to continue to benefit from these *ex ante* incentives, they had to make an application within

<sup>54</sup> Commission Regulation (EC) No 2342/2003 of 29 December 2003 granting the Democratic Socialist Republic of Sri Lanka the benefit of the special incentive arrangements for the protection of labour rights, OJ L 346, 31.12.2003, p.34–35.

<sup>55</sup> Russia also applied but requested to postpone the decision in 2002. Georgia and Mongolia benefit from the GSP+ scheme from 2006 (see below).

<sup>56</sup> Amended Proposal for a Council Regulation applying a scheme of generalised tariff preferences for the period 1 January 2002 to 31 December 2004, COM (2001) 688, OJ C 075 E, 26.03.2002, p.51–103.

<sup>57</sup> General Affairs Council, Draft minutes, 10 December 2001.

<sup>58</sup> Council Regulation (EC) No 980/2005 of 27 June 2005 applying a scheme of generalised tariff preferences OJ L 169, 30.6.2005, p.1–43.

three months. The Commission then examined the requests, taking into account the findings of the relevant international organisations, implying that the beneficiary countries' compliance with the CLS should be monitored, making use of the findings of the relevant ILO bodies. On that basis, the Commission would confirm whether the preferences would be continued. For the 14 listed countries, not applying for the GSP+ preferences thus implied a higher tariff barrier to the EU market.

GSP+ beneficiaries henceforth have to *ratify* the eight ILO Conventions,<sup>59</sup> which again illustrates the ILO's growing relevance. Moreover, Europe's emphasis remains on trade incentives—although the punitive regime continues to exist in case of 'serious and systematic violations' of the ILO CLS. Pascal Lamy announced the new Regulation as a clear example of Europe's 'soft power' and as a 'step towards better global governance'.<sup>60</sup> However, only 'vulnerable countries' are eligible for GSP+ preferences.<sup>61</sup> This means that countries such as China and India no longer qualify for the incentive scheme—including its provisions about labour standards. The list of eligible countries<sup>62</sup> reveals that most GSP+ beneficiaries are former beneficiaries of the drugs arrangement. Since 1 January 2006, the following 15 countries have benefitted from GSP+ incentives: Bolivia, Colombia, Costa Rica, Ecuador, Georgia, Guatemala, Honduras, Sri Lanka, Republic of Moldova, Mongolia, Nicaragua, Panama, Peru, El Salvador and Venezuela. This means that *all* former drugs beneficiaries from the Andean Community and the CACM successfully switched over to the GSP+ incentives. Among non-drugs beneficiaries are the two former beneficiaries of the labour incentives (Moldova and Sri Lanka) as well as Georgia and Mongolia. All countries that provisionally (before the approval of their application) received the preferences turned out to benefit from the incentive scheme.<sup>63</sup> It is difficult to escape the impression that the GSP+ regime basically boils down to an objectively legitimised recycling of the former drugs GSP—excluding Pakistan.

It is thus not surprising that the international labour movement<sup>64</sup> condemned the granting of special trade preferences 'to some of the

<sup>59</sup> Ibid.

<sup>60</sup> Lamy, P, *Financial Times* (17 January 2004).

<sup>61</sup> Article 9(3) of the Council Regulation (EC) No 980/2005 of 27 June 2005 applying a scheme of generalised tariff preferences, OJ L 169, 30.6.2005, pp. 1–43 defines a vulnerable country based on World Bank classifications and import figures to the EU market.

<sup>62</sup> Commission Decision of 21 December 2005 on the list of the beneficiary countries which qualify for the special incentive arrangement for sustainable development and good governance, provided for by Article 26(e) of Council Regulation (EC) No 980/2005 applying a scheme of generalised tariff preferences, OJ L 337, 22.12.2005, p.50.

<sup>63</sup> Moldova is the only country that was not listed among the provisional beneficiaries in the Council Regulation, but receives GSP+ preferences since 1 January 2006.

<sup>64</sup> India has also expressed some doubts as to whether the new GSP+ faithfully implemented the WTO ruling, and it made clear that it may return to this matter in the future.

world's worst violators of trade union rights'. The European Trade Union Confederation (ETUC) stated that each of the 15 beneficiaries has been criticised by the ILO.<sup>65</sup> On the other hand, Trade Commissioner Mandelson declared that:

According to the ILO supervisory committees, most of the applicant countries have made substantial changes to their legal systems in order to comply fully with the rights enshrined in the ILO conventions, in particular regarding the freedom of association and the right to collective bargaining.<sup>66</sup>

However, recent research has indicated that several countries have received GSP+ preferences, despite being seriously criticised by the ILO for their flawed implementation of the relevant conventions.<sup>67</sup> Moreover, the EU GSP+ scheme has neither led to an overall improvement in labour standards implementation in those countries.

Conditionality provisions in the latest GSP amendment, of July 2008, are identical to the system sketched above.<sup>68</sup> Also, the list of beneficiaries remains largely unchanged.<sup>69</sup> However, the EU has recently started investigations against violations of the GSP+ conventions in El Salvador<sup>70</sup> and Sri Lanka.<sup>71</sup> This will be a test for the willingness of the EU to withdraw GSP+ preferences.

#### THE BALANCE SHEET: CORE LABOUR STANDARDS DROWNING AMONG OTHER OBJECTIVES

Have labour standards in the EU's GSP system been used as a veiled protectionist instrument? If not, could Europe's unilateral practice in this domain pave the way for a more constructive dialogue on a social clause at the multilateral trade level? The answer to both questions is negative. Although the EU has not engaged in hidden protectionism through its social

<sup>65</sup> European Trade Union Confederation (ETUC) (Press Release, 21 December 2005).

<sup>66</sup> European Parliament, H-1052/05, 15 December 2005.

<sup>67</sup> Orbie, J and Tortell, L (2009) 'The New GSP-Plus Beneficiaries: Ticking the Box or Truly Consistent with ILO Findings?', *European Foreign Affairs Review*, 3 (forthcoming).

<sup>68</sup> Council Regulation (EC) No 732/2008 of 22 July 2008 applying a scheme of generalised tariff preferences for the period from 1 January 2009 to 31 December 2011 and amending Regulations (EC) No 552/97, (EC) No 1933/2006 and Commission Regulations (EC) No 1100/2006 and (EC) No 964/2007 OJ L 211, 6.8.2008, p.1–39.

<sup>69</sup> Panama and Moldova have disappeared but not for political reasons, while Paraguay, Armenia and Azerbaijan have been added.

<sup>70</sup> Commission Decision of 31 March 2008 providing for the initiation of an investigation pursuant to Article 18(2) of Council Regulation (EC) No 980/2005 with respect to the protection of the freedom of association and the right to organise in El Salvador OJ L 108, 18.4.2008, p.29.

<sup>71</sup> Commission Decision of 14 October 2008 providing for the initiation of an investigation pursuant to Article 18(2) of Council Regulation (EC) No 980/2005 with respect to the effective implementation of certain human rights conventions in Sri Lanka OJ L 277, 18.10.2008, p.34.

GSP clauses, the process-tracing analysis reveals that three crucial criteria for a legitimate application of a social clause (objectivity and transparency, consistency with the ILO, and generosity in tariff reductions) have only partly been met.

To be sure, the ILO has become increasingly important in the EU's GSP<sup>72</sup>—basically reflecting Europe's broader attitude towards a social clause since 2001. Whereas the decision-making procedures in the 1994 and 1998 regulations made no reference to the ILO, from 2001 onwards the Union declares its intention to use the available ILO assessments, comments, decisions, recommendations and conclusions. At the same time the legal basis of the incentive and punitive clauses was extended, removing the implicit hierarchy among 'fundamental' labour standards and embedding the social GSP regime into the international consensus about the eight ILO CLS. The GSP+ Regulation further upgrades the relevance of the ILO CLS: beneficiaries have to effectively implement *and* also ratify the relevant conventions.

However, this evolution was partly prompted by external events: the WTO case following Pakistan's doubtful inclusion in the GSP drugs arrangement. In addition, the granting of GSP+ incentives to a number of Latin American countries has been found conflicting with ILO evaluations. Notwithstanding increased emphasis on ILO consistency in the GSP+ Regulation, the 'special incentive arrangement for sustainable development and good governance' has not amounted to much more than a recycling of the previous GSP drugs preferences—plus Georgia, Mongolia, Sri Lanka and Moldova, and minus Pakistan. Also, the most recent GSP amendment and the newest list of GSP+ beneficiaries confirms this conclusion.

In addition, the intra-European skirmishing around the application of the sanction clause to Belarus has put the legitimacy of the social GSP clause and the alleged consistency with the ILO into perspective. In 2005 the Commission concluded that ILO Convention Nos 87 and 98 were seriously and systematically violated.<sup>73</sup> Since Belarus showed no commitment to improve this situation in the following months—which was confirmed by strong criticism from the ILO—the Commission proposed the withdrawal of GSP preferences. However, contrary to expectations, the Council did not give its approval instantly. The official reason for the delay that the complaint brought before the ILO would be resolved after meeting the Belarus deputy prime minister, barely hides the fact that the rejection of

<sup>72</sup> Cf Clapham, A and Martignoni, JB, 'Are We There Yet? In Search of a Coherent EU Strategy on Labour Rights and External Trade' in VA Leary and D Warner (eds), *Social Issues, Globalisation and International Institutions* (Leiden, Martinus Nijhoff Publishers, 2006) 286.

<sup>73</sup> Commission Decision of 17 August 2005 on the monitoring and evaluation of the labour rights situation in Belarus for temporary withdrawal of trade preferences OJ L 213, 18.8.2005, p.16.

the mini-sanctions against Belarus was linked with other EU trade dossiers such as anti-dumping measures against Chinese shoes.<sup>74</sup> At the end of 2006, the Council of Ministers finally agreed on trade sanctions, which have been implemented since 21 July 2007.<sup>75</sup>

Ambiguous decision-making on granting and withdrawing GSP labour preferences weakens the legitimacy of the system. But this does not necessarily imply that the social GSP clause has served as a protectionist tool. On the contrary, in line with general findings on Europe's international role,<sup>76</sup> EU discourse and policy practice has increasingly emphasised the carrot instead of the stick. Although in 1995 a punitive social clause was established, whereas the possible introduction of labour incentives was postponed, Europe has 'moved from a "carrot and stick" to a "more carrots" approach' since 1998.<sup>77</sup> The EU propagated the social incentive scheme as a model for the multilateral trading system.<sup>78</sup> Up to today the punitive clause has only been used with regard to Burma and Belarus, where there is a wide international consensus that trade sanctions are legitimate, and reflected in an unambiguous statement by ILO bodies that a serious breach has occurred persistently.<sup>79</sup>

It is thus safe to conclude that the social GSP clause has not been a protectionist wolf in social clothing. It is not the protectionist use of GSP labour provisions that provoked political debate, but rather the *absence* of trade measures against trading partners such as Pakistan, China, Colombia and Belarus. One could cynically conclude that the EU missed an opportunity to legitimately engage in protectionist behaviour vis-à-vis relatively competitive developing countries in Latin America and Asia.

The more fundamental issue is that since the 1990s, the EU has relatively generously granted trade preferences albeit in pursuit of other foreign policy objectives than the promotion of CLS. What is more, these other initiatives have basically undermined the relevance of a social GSP clause. Although the preferential scope of its GSP is relatively limited, Europe has extensively used its available margin to achieve a number of foreign policy and trade-related

<sup>74</sup> Rettman, A., 2006, 'Belarus Sanctions Farce Sheds Light on EU Machine'. In: *EUObserver*, 12.10.2006.

<sup>75</sup> Council Regulation (EC) No 1933/2006 of 21 December 2006 temporarily withdrawing access to the generalised tariff preferences from the Republic of Belarus OJ L 405, 30.12.2006 p.35.

<sup>76</sup> Smith, KE, *European Union Foreign Policy in a Changing World* (Cambridge, Polity, 2003) 199.

<sup>77</sup> Brandtner and Rosas (n 20) 714.

<sup>78</sup> Von Schöppenthau, P, 'Trade and Labour Standards: Harnessing Globalisation?' in KG Deutsch and B Speyer (eds), *The World Trade Organisation Millennium Round. Freer Trade in the Twenty-First Century* (London/New York, Routledge, 2001) 226.

<sup>79</sup> Orbie and Tortell (2009) 'The New GSP-Plus Beneficiaries: Ticking the Box or Truly Consistent with ILO Findings?'.

objectives, and the pursuit of fundamental labour standards has not taken priority among these goals.

Three instances substantiate this point. First, the EU elaborated a separate GSP policy vis-à-vis the LDCs. Shortly before the introduction of the social incentive clause in 1998, LDCs received more favourable access to the EU market. This was extended in 2001 when free access for (almost) all LDC imports was granted under EBA. There is no linkage between EBA eligibility and CLS. Thus, half a year before the extension of Europe's social incentive regime, it had in fact become irrelevant for 50 LDCs. Whatever the reasons for these generous LDC initiatives since 1998,<sup>80</sup> it is remarkable to note that there has not been a European political debate on its consequences for the social GSP clause.

While most LDCs are situated in Africa and Asia, the second point relates to trade preferences for Latin American countries. The Council's 1998 decision to unlink the drugs and labour GSP systems was extended in 2001. As in the case of LDCs, this GSP system made the labour incentive scheme essentially superfluous. As explained above, it is very questionable whether the new GSP+ system is a step forward in this respect. Moreover, the application of the new Regulation's social incentive clause is henceforth limited to 'vulnerable countries'—largely defined in terms of (limited) export to the EU market. This means that additional tariff preferences can no longer be used as a carrot to stimulate the observance of CLS with important trading partners—and potential violators of these standards—such as the United Arab Emirates, Argentina, Brazil, Chile, China, Egypt, Indonesia, India, Morocco, Mexico, the Philippines, Pakistan, Russia, Saudi Arabia, South Africa, Thailand, Ukraine, Uruguay and Uzbekistan.

Lastly, some of the potential GSP+ beneficiaries have concluded or are in the process of negotiating bilateral free trade agreements (FTAs) with the EU,<sup>81</sup> which then replace the GSP preferences. This brings us to the third instance: these so-called FTA+ or WTO+ agreements provide for reciprocal liberalisation in goods and agriculture, as well as regulatory issues in areas such as services, intellectual property rights, investment, competition, government procurement, and geographical indications. The question to what extent has the EU managed to integrate CLS in these new-established bilateral

<sup>80</sup> See Orbie, J, 'The Development of EBA' in G Faber and J Orbie (eds), *European Union Trade Politics and Developing Countries: Everything but Arms Unravelling* (London/New York, Routledge, 2007).

<sup>81</sup> For eg, the FTA+ agreements with Mexico (signed in 1997), South Africa (1999), Chile (2002), and some Southern Mediterranean countries. Similar agreements are being negotiated with Mercosur, the Gulf Cooperation Council, and with five ACP regions, the EU-Cariforum Economic Partnership Agreement already being concluded. The EU has, following the Commission's Global Europe communication of 2006, also started FTA+ negotiations with South Korea, India and ASEAN. In the context of the European Neighbourhood Policy the EU has recently also started negotiations with Ukraine.

agreements is beyond the scope of this chapter, but a cursory reading of existing FTAs learns that ILO labour standards are at best marginally referred to.

Limiting our focus to the unilateral GSP, our conclusion reads that Europe's pursuit of CLS in trade was overshadowed by a commitment to other objectives. In parallel with EU negotiations on a social GSP clause since 1995, Europe's available preferential margin has been used for *other* objectives. Geopolitical concerns (Latin America and drugs regime, including Pakistan), as well as multilateral and bilateral trade policy agendas (the instrumentality of the LDC initiatives in launching a WTO round and in reforming the ACP regime; the pursuit of reciprocal FTA+ agreements with larger developing countries; linkage between Belarus sanctions and other trade issues) took priority over the advancement of CLS through trade.

The point of this discussion is thus not so much that the EU has lacked the generosity to grant extra trade preferences—let alone that it has been protectionist—but rather that EU policy-makers showed a *selective* generosity targeted to other international goals than CLS. This inconsistency also explains why the decision-making process on the application of the GSP labour incentives and sanctions remains ambiguous. A more transparent, objective and generous commitment to CLS through the GSP system would be required in order to gain confidence with developing countries and resuscitate the issue of a social clause at the WTO level. Developing countries may now be reassured that the EU is not intent to use labour standards as a convenient barrier against their imports, but the social GSP case also illustrates Europe's limited ambition to advance CLS through trade.

This links up with the internal dimension of EU politics, where the role of the European Community in promoting CLS is also relatively modest.<sup>82</sup> Tonia Novitz' research shows that the capacity of the EU in the ratification,<sup>83</sup> coordination, implementation and control of some ILO fundamental

<sup>82</sup> For a legal analysis of competence issues between the EU, its Member States and the ILO, see also: Novitz, T, "A Human Face" For the Union or More Cosmetic Surgery? EU Competence in Global Social Governance and Promotion of Core Labour Standards' (2002) 3 *Maastricht Journal of European and Comparative Law* 9; Cavicchioli, L, 'The Relations Between the EC and the International Labour Organisation' in E Cannizzaro (ed), *The European Union as an Actor in International Relations* (The Hague/London/New York, Kluwer Law International, 2002); Picard, L, 'L'Union Européenne et l'Action des Nations Unies dans le Domaine des Droits de l'Homme' in D Dormoy (ed), *L'Union Européenne et les Organisations Internationales* (Bruxelles, Editions Bruylant, Réseau Vitoria, 1997); and Clapham and Martignoni, 'Are We There Yet? In Search of a Coherent EU Strategy on Labour Rights and External Trade' (2006). For a political science analysis about competence issues in the EU position on a social clause, see Johnson, *European Welfare States and Supranational Governance of Social Policy* (2005) and Orbie et al, 'EU Trade Policy and a Social Clause: a Question of Competences?' (2005).

<sup>83</sup> One indication is the number of ratifications within the EU. By the end of the 1990s the EU-15 had ratified the eight ILO core conventions, but the picture again became incomplete with the accession of Estonia, the Czech Republic, and Latvia. Since 2007, these Member States have also ratified all fundamental conventions.



conventions (eg freedom of association) leaves much to be desired.<sup>84</sup> She also criticises the EU's incoherence: the 'laudable external policies' in Europe's social GSP clause do not correspond with its incomplete internal competences regarding the very same CLS.<sup>85</sup> This chapter adds that, after all, these external policies may not be all that laudable. From this perspective, the EU's internal and external commitments to labour standards seem to be coherent. The prioritisation of political and trade objectives over CLS basically reflects the intra-European integration project.

<sup>84</sup> Novitz, T, 'The European Union and International Labour Standards: the Dynamics of Dialogue between the EU and the ILO' in P Alston (ed), *Labour Rights as Human Rights* (Oxford, Oxford University Press, 2005).

<sup>85</sup> Alston, P, 'Labour Rights as Human Rights: The Not So Happy State of the Art' in P Alston (ed), *Labour Rights as Human Rights* (Oxford, Oxford University Press, 2005) 19; cf Novitz, 'The European Union and International Labour Standards' (2005) 234.